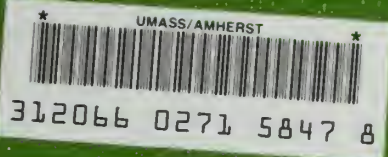


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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.		Division of Administrative Law Appeals
Appeal of:		
Morganti-Pomco,	*	Docket No. CP-91-229
Appellant	*	
	*	
vs	*	
Division of Captial Planning and Operations,		
Respondent	oOo	
Appearance for Appellant:		Joseph A. Pisarri, Esq. Corwin & Corwin One Washington Mall Boston, MA 02108
Appearance for Respondent:		Stephen J. Hines, Esq. D.C.P.O. One Ashburton Place Boston, MA 02108
Administrative Magistrate:		Kimberly A. Fletcher, Esq.

GOVERNMENT DOCUMENT COLLECTION
JUN 02 1992
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RULING ON RESPONDENT'S MOTION FOR RECONSIDERATION

Pursuant to 801 CMR 1.01(10)(p), the Standard Adjudicatory Rules of Practice and Procedure, on October 15, 1991, the Respondent timely moved for reconsideration of the Decision issued in this matter on October 4, 1991 and submitted a memorandaum in support. A hearing on the motion was held on October 31, 1991 at the offices of the Division of Administrative Law Appeals.

Respondent's main contention is that if the RFP did not require duplex lines from the emergency generator to the service equipment then it is not necessary to interpret G.L. c. 149, §44E(4) to decide the claim. I agree. Since Appellant's

proposal conformed to the RFP, the unconditional acceptance by the awarding authority of the proposal is not at issue.

Since the RFP did not require duplex lines from the emergency generator to the service equipment, the other arguments of Respondent are without merit.

With the clarification regarding the interpretation of G.L. c. 149, §44E(4), Respondent's motion for reconsideration is denied.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kimberly A. Fletcher
Administrative Magistrate

DATED: *Nov 7, 1991*

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

GOVERNMENT DOCUMENTS
COLLECTION

Appeal of:

Suffolk Construction Co., Inc.
Appellant

JUN 02 1992

v.

Docket No. CP-91-760

Division of Capital
Planning & Operations,
Respondent

Appearance for Appellant:

Leonard Ferrara, Jr., Pres.
Superior Rail &
Ironworks, Inc.
P.O.Box 546
Bridgewater, MA 02333

Appearance for Respondent:

Gerald L. Solomon, Esq.
Division of Capital
Planning & Operations
One Ashburton Pl., 15 fl.
Boston, MA 02108

Administrative Magistrate:

Sarah H. Luick, Esq.

DECISION

Pursuant to G.L.c.30, s.39Q, the Appellant, Suffolk Construction Co., Inc., is appealing the inaction of the Deputy Commissioner of the Division of Capital Planning and Operations (DCPO), on its request of September 25, 1990, to review the August 29, 1990 rejection of its change order by the DCPO Director of the Corrections Special Unit (Exs. 2 and 3). The appeal was filed April 8, 1991 (Ex. 1). A hearing was held on August 23, 1991, at the offices of the Division of Administrative Law Appeals, 100 Cambridge Street, Room 904, Boston, MA, 02202, pursuant to G.L.c.7, s.4H.

Various documents are in evidence (Exs. 1-14). The Appellant presented the testimony of Leonard Ferrara, Jr. of Superior Rail and Ironworks, Inc. (Superior). The Respondent presented the testimony of Stephen L. Enright, the Project Manager with the Architects Collaborative, Inc., the project architect. Both parties made arguments on the record.

Findings of Fact

1. Superior Rail and Ironworks, Inc., (Superior) is the Miscellaneous Steel Filed Subcontractor of Suffolk Construction Co., Inc. (Suffolk), the General Contractor, on Mass. State Project No. CNO 80-1, Contract No. 1, Norfolk County Jail and House of Correction (Ex. 13).

2. Superior, pursuant to Contract Section 05101, Miscellaneous and Ornamental Iron, and by Addendum No.4, Section 05101,1.02,A.,7., had to furnish loose steel lintels including all lintels that support masonry. Section 3.04, F.,1., Steel Lintel Schedule, reads in part as follows:

Furnish all steel lintels on the project ... The lintels furnished herein shall be installed under Section 04101, Masonry. Note: openings 3'-0" or less in general will receive bond beam block units. Refer to structural drawings for lintel schedule (Ex. 13)

3. Drawing S-48 contains under Masonry at #6, the direction to "provide lintels over all masonry openings" with a reference to the Masonry Loose Lintel Schedule also on the drawing. That schedule, in pertinent part, provides for the following:

1. Unless otherwise indicated on the drawings provide one angle for each 4" of masonry thickness for all masonry openings in accordance with the following schedule:

Maximum masonry opening ...

Up to 4'-0" ...

4'-1" to 6'-0" ...

6'-1" to 8'-0" ... (Ex. 13)

4. At Contract Article II, the following guidance is provided:

All plans, general and detail, are to be deemed a part of this contract, and the plans and specifications and contract are to be considered together, and are intended to be mutually complementary, so that any work shown on the plans, though not specified in the specifications, and any work specified in the specifications though not shown on the plans, is to be executed by the contractor as a part of this contract ... All things which in the opinion of the Designer may reasonably be inferred from the contract and plans are to be executed by the contractor under the terms of the contract; ... In case of discrepancies plans take precedence over specifications (Ex. 13).

5. At Contract Article III and at Section 05101,1.01, A., the General Contractor and Filed Subcontractor are instructed as follows:

1. Carefully study the contract documents ... and procure from the Designer special information as to any part of the work not fully shown by said specifications, plans or orders, detail drawings if detail drawings are to be provided, and directions as to the order and manner of doing the work.

2. ... submit all cases of doubt or discrepancy to the Designer ... (Ex. 13).

6. Superior has worked on numerous projects where as

the miscellaneous steel subcontractor it provided items such as those called for in Contract Section 05101. To Superior's experienced estimator, Section 05101 and the drawings appeared to be typical for a filed sub-bidder (Testimony).

7. There is no drawing detail showing whether concrete bond beams or steel lintels are required when there is a masonry opening of 3'-0" or less, as per contract section 05101,3.04,F.,1. There is no schedule for sizes of reinforcing bars or for quality of concrete for concrete bond beam units on any of the drawings. Superior, as a Miscellaneous Steel Filed Sub-bidder, did not look for a concrete bond beam schedule (Testimony).

8. Drawing A-3 contains a blow-up for a basic cell layout which includes a note of; "painted steel access panel ... 28"x 40" mounted above CMU base." Using drawing A-11 for a floor plan for the location of particular jail cells leads to use of Drawing A-46 for the cell door schedule. The schedule lists where to examine in regard to the head detail. Drawing A-47 contains the frame detail at S3 for Steel Security Frame (Head). It shows the concrete beam, but not steel lintels. Use of all these drawings does not resolve the issue of whether steel lintels are required for masonry openings of 3'-0" or less (Ex. 14 and Testimony).

9. In bidding, Superior's estimator concluded the S-48 schedule was consistent with Contract Section 05101,3.04,F., 1., relying on the Contract Article II, that the plans and specifications are "mutually complementary." The estimator

concluded that openings of 3'-0" or less would receive bond beam block units and not steel lintels. The estimator concluded that S-48 did not require steel lintels for masonry openings that are 3'-0" or less because of Contract Section 05101,3.04,F.,1.'s note that openings 3'-0" or less would in general receive bond beam block units, and because no drawing showed a head detail in the access panels at the jail cells with steel lintels. The estimator did not interpret the S-48 masonry loose lintel schedule referring to "up to 4'-0" to mean the same as 0 to 4'-0" because of the 3.04,F.,1. note. In good faith Superior uncovered no discrepancy between the specification and the schedule on S-48 at the time of the bidding (Testimony).

10. Superior submitted detailed shop drawings showing no lintels for access panels at masonry openings of 3'-0" or less. The Architect, at a job meeting and in writing, informed Superior through Suffolk that by S-48's Masonry Loose Lintel Schedule, lintels are required at all openings of 0 to 4'-0" (Ex. 9; Testimony).

11. Superior protested to Suffolk, explaining their interpretation as to why lintels are not required for masonry openings 0 to 3'-0". The Architect, by correspondence of June 22, 1990, directed Suffolk to provide structural steel lintels above the steel access panels with openings under 3'-0" (Exs. 6 and 7).

12. Suffolk thereafter informed Superior to proceed under protest as per Contract Article VI, Change Order

Provisions, with the work of providing lintels for the access panels at the jail cells (Ex. 8).

13. A change order was filed on or about August 15, 1990 for providing steel lintels over access panels in the mechanical chases. Suffolk has revised its original submission to reflect corrections made by DCPO, and seeks \$4,761.00 (Exs. 4 and 10; Stipulation).

14. The Architect, with whom the Resident Engineer agreed, recommended disallowance of the change order.

The specifications call for a masonry bond beam in openings 3'-0" or less in general; however, we point out that in Article II of the Contract and General Conditions, paragraph one (1), reference is made to discrepancies - plans take precedence over specifications. It is our position that the Lintel Schedule on Drawing S-48, "Masonry Loose Lintel Schedule," will be required at these and any other openings so requiring same for this project (Ex. 11).

15. The DCPO Director of the Corrections Special Unit rejected the change order for the reason:

Loose lintels are included in contract documents (Ex. 3).

16. Suffolk sought review of the rejection by the DCPO Deputy Commissioner. Suffolk subsequently appealed to the Division of Administrative Law Appeals when the Deputy Commissioner took no action on the request (Exs. 1 and 2).

CONCLUSION

The issue on appeal involves an assessment of how clear

and sufficient the Contract specification and plans are in directing Superior, and through Superior, Suffolk, to provide steel lintels to support masonry for all the masonry openings at access panels which are 3'-0" or less. The standards Superior and Suffolk are held to are found in the Contract General Conditions at Article II (1) in regard to the priorities to assign to specifications and plans. Both are to be "considered together." They are "intended to be mutually complementary." If work is shown on the plans but not set forth in the specifications, or vice versa, it must still be done. When a discrepancy arises, "plans take precedence over specifications."

Case law provides general direction on contract interpretation. The Court in McMahon v. Monarch Life Insurance Co., 186 N.E. 2d 827, 830 (Mass. 1962), explained;

... a contract is to be construed to give a reasonable effect to each of its provisions if possible. S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., ... 180 N.E. 2d 446 and cases cited.

The court in John F. Miller Co., v. George Fichera Construction Co., 388 N.E. 2d 1201, 1204 (Mass. App. 1979), noted the following:

Except for trifling detail, parties are bound to the precise requirements of their contract. Albre Marble & Tile Co., v. Goverman, ... 233 N.E. 2d 533 (1968).

As a general principle, the Court in Bowser v. Chalifour, 135 N.E. 2d 643, 645 (Mass. 1956) noted the following:

It is settled that a written instrument is construed strongly

against the party who drew it if ambiguous or uncertain language is used. New York Central Railroad Co. v. Stoneham, ... 23 N.E. 679; Morse v. City of Boston, ... 157 N.E. 523; Shaffer v. Hotel and Railroad News Co., ... 165 N.E. 389.

But, the Court in Beacon Construction Co. v. U.S., 314 F.2d 501,504 (1963), imposed on a contractor the responsibility when presented with a specification containing "an obvious omission, inconsistency or discrepancy," to "at least ask for clarification."

Using these standards, and in light of the facts found, the record shows Superior was reasonably interpreting its plans and specifications at the time of bidding when it determined that no steel lintels would be used for masonry openings 3'-0" or less. Superior was reasonable in its assessment and acting in good faith when it uncovered no discrepancy between its specifications and the plans (including S-48's Loose Lintel Schedule.) Although plans take precedence over specifications when there are discrepancies between them, and directions found on plans although not set forth in the specifications must be satisfied, no obvious discrepancy emerges when S-48 is read with Section 05101,3.04,F.,1. No obvious discrepancy emerges when A-3, A-11, A-46 and A-47 are also examined.

The language of the note in Section 05101,3.04,F.,1. should not have appeared in this Section, because it was misleading. The language in the note does not become an obvious discrepancy where plans would take precedence over

it, or where Superior would have been on notice to seek clarification from the Architect. In this regard, I find credible the testimony of Mr. Ferrara of Superior when he highlighted the distinction between "up to 4'-0" and 0 to 4'-0" in interpreting S-48. The former is not inconsistent with the information in the note. It does appear, to make room for a masonry opening under 3'-0" which would receive a bond beam unit and not steel lintels. This interpretation is bolstered by the lack of any head detail showing steel lintels for openings 3'-0" or less.

As a Filed Sub-Bidder, Superior would not have examined the masonry specifications and plans absent direction to do so. Its own specifications and plans did not raise an obvious need to look for a detail for the concrete bond beam unit so that upon finding none, it would have concluded the note in Section 05101,3.04,F.,1. is a discrepancy. That assessment reflects a judgment made in hindsight, and is not useful to resolve the issue on appeal.

Concerning Suffolk's responsibility to have uncovered a discrepancy between Superior's specifications and plans, the evidence presented reveals no obvious lack of care by Suffolk. The matter of what the contract was calling for with masonry openings 3'-0" or less was not at all obvious. Consequently, it is reaching too far to hold Suffolk to a standard of care and due diligence of analyzing all possible clues, such as the lack of any drawing detail for concrete bond beam units, toward discovering that S-48 and the note of

Section 05101,3.04,F.,1. raise an obvious discrepancy needing resolution by the Architect.

For the foregoing reasons, the change order request of Suffolk is allowed in the agreed upon amount of \$4,761.00. It is so ordered.

DIVISION OF ADMINISTRATIVE
LAW APPEALS

Sarah H. Luick
Sarah H. Luick
Administrative Magistrate

DATED: Dec 3, 1991

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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Appeal of:

Peabody Construction
Company, Inc.,
Appellant

v.

Docket No. CP-91-623

Division of Capital Planning
and Operations,
Respondent

Appearance for Appellant:

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175 Derby Street, #12
Hingham, MA 02043

Appearance for Respondent:

Stephen J. Hines, Esq.
Division of Capital
Planning and Operations
One Ashburton Pl., 15th fl.
Boston, MA 02108

Administrative Magistrate:

Sarah H. Luick, Esq.

DECISION

Pursuant to G.L.c.30, s.39Q, the Appellant, Peabody Construction Company, Inc. (Peabody), is appealing the inaction of the Deputy Commissioner of the Division of Capital Planning and Operations (DCPO) in reviewing Peabody's change order request for \$113,779.00 of which DCPO allowed only \$39,799.00 (Exs. 1 and 2). The appeal was timely filed (Ex. 1). The project is NCCI-Gardner, MSP #P82-26, Contract No. 1. A hearing was held July 26, 1991, at the offices of the Division of Administrative Law Appeals, 100 Cambridge Street, Room 904, Boston, MA, pursuant to G.L.c.7, s.4H.

Various documents are in evidence (Exs. 1 - 20). The

Appellant presented the testimony of: Murray Glazer, General Superintendent for Peabody; Christopher Biasizzo of Biasizzo Construction Co. who performed excavation work for Rev-Lyn Contracting Co. (Rev-Lyn), a Sub-Contractor on the project; Roy Urban of R.J. Urban Construction Co. who drove trucks hauling away the excavated material for Rev-Lyn; and, Robert White, a Peabody Project Manager on the project. The Respondent presented the testimony of: John MacMillan, a DCPO Project Engineer on the project; and, Alben Hebert, the DCPO Resident Engineer on the project. Both parties made arguments on the record and filed briefs by September 9, 1991.

Findings of Fact

Based on the documentary and testimonial evidence presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Peabody Construction Company, Inc. is the General Contractor on DCPO project, NCCI-Gardner, MSP #P82-26, Contract No. 1. Among the Contract items was excavation for installation of the foundation and footings for a new kitchen at the Domestic Building on the prison grounds. The Sub-Contractor responsible for excavation is Rev-Lyn Contracting Co., Inc. The Architect on the project is deCastro/Nelson Associates (John Murphy). The Structural Engineer on the project is Boston Building Consultants.

2. Excavation had just commenced at the rear of the

Domestic Building site by December 14, 1989. This was the location for the new kitchen addition. Rev-Lyn removed the existing slab and uncovered "all fill material at the depth of the new footings" which could not be used under the concrete slab to support the foundation and footings for the new kitchen addition. This matter was raised at the job meeting of December 14, 1989. The Architect, John Murphy, had Boston Building Consultants examine the material (Ex. 12).

3. Boston Building Consultants, on or about December 15, 1989, examined the material at the site of the new addition. They reported to Mr. Murphy in writing on or about December 18, 1989, the following:

Excavation for the foundations of the Domestic Building indicate that relatively shallow ledge is overlaid by fill consisting of cobbles and building rubble. This material is unsuitable for use under the building and must be removed. The ledge appears to be extensively trenched for existing under slab utilities. Additional trenching for new utilities may be required (Ex. 11).

4. Peabody's on site Field Superintendent noted in his Construction Report of December 18, 1989; "ledge & large rubble & cobbles in Domestic Bldg. Cannot install new ftgs. & foundation in this material." In his December 19, 1989 Construction Report he noted; "soil borings in Domestic Bldg. do not indicate rubble encountered. Structural Engineer to review." (Ex. 13).

5. During the later half of December 1989, once Boston

Building Consultants had assessed the condition of the material, ongoing talks commenced among Peabody, DCPO and the Architect as to how to proceed with excavation. All agreed there was a need to resolve the issue as soon as possible. The Contract contained bonus provisions if the project was completed within a specified time frame. Peabody had developed a reasonable but aggressive schedule for completion of the work at the Domestic Building.

6. Excavation work by Rev-Lyn was continuing during the period of the ongoing talks. Rev-Lyn had begun "removing rubble in Domestic Bldg" on December 21, 1989, and by December 26 and 27, 1989 were "removing ledge" and "ledge-cobbles." These findings were noted by the Peabody on site Field Superintendent in his Construction Reports (Ex. 13).

7. An on site meeting took place on December 21, 1989. Mr. White, a Peabody Project Manager, decided from the discussions that he would write a letter to seek resolution of the question of the extent of ledge excavations and backfill involved toward determining the unit prices to apply to the excavated material (Ex. 14).

8. By December 29, 1989, an agreement was reached and an Authorization To Proceed (ATP) was issued for excavating the material at the site for the new kitchen addition, and then for backfilling with structural fill. The change order was to be performed pursuant to Article VI of the Contract, on the following basis:

A sum "NOT-TO-EXCEED" \$53,000.00
based on Size & Quantity records

kept by Resident Engineer and Contractor in accordance with the Contract and Bulletin No.13. General Contractor's and Subcontractor's quotes considered as "NOT-TO-EXCEED" prices (Ex. 10).

9. This ATP was issued based on the information discussed at the December 21, 1989 job meeting. It was based on the information known then about the material uncovered under the existing slab at the Domestic Building site. At that point, no large rocks or pieces of ledge had been encountered.

10. John MacMillan, DCPO's Project Engineer on the project, by December 29, 1989, based on discussions about the known conditions, produced a worksheet of calculations to arrive at \$53,000.00 for the not to exceed amount for the change order work. He examined a footprint of the new addition to arrive at a 10,000 square foot area. He assumed an average depth of excavation of 6 feet, to get 60,000 square feet. He then arrived at a volume of 2,222 cubic yards of material to be excavated. He assumed the material would fit the Contract definition for unsuitable material and that the excavation would be open cut work. He applied the Contract unit prices of \$6.50 for 60% of the volume to arrive at \$9,750.00; and, \$10.00 for 40% of the volume to arrive at \$10,000.00. He rounded off to a total excavation cost of \$20,000.00. He then used 2,500 cubic yards for the volume of the excavation to be backfilled, applying a unit price of \$12.90, to arrive at a cost of \$32,250.00. The total of the two amounts was rounded up to \$53,000.00 (Ex. 10).

11. At Contract Section 01025, Unit Prices, 1.02, Unanticipated Sub-Surface Conditions, the particular unit prices applicable for change order work are set forth:

A. Additional Excavation:

1. Excavation (other than excavation of rock as herein defined) below the bottom grades for the work indicated, if ordered to be removed by the Architect with the prior written approval of the Division of Capital Planning and Operations, because of "Differing Site Conditions", (see Article VI) will be paid for, in addition to the lump sum contract price at the following rates.
2. For the first 4 feet below bottom grade, \$6.50 per cubic yard, ...
3. For the second 4 feet below bottom grade, \$10.00 per cubic yard, ...
4. For depths of more than 8 feet below bottom grade, compensation will be made in accordance with Article VI of the Contract (Ex. 8).

12. The general information regarding when unit prices are employed is found at Contract Section 01025, 1.01:

- A. The base bid (lump sum) includes those items of work as listed herein. The unit prices will only be necessary if authorized for additional work which is unanticipated at the time or to reduce the quantity of work included in the bid price.
- B. No unit price items shall exceed the estimated quantity unless and until a written authorization or change order has been issued by the Division of Capital Planning and Operations (Ex. 8).

13. The same Contract Section 01025 at 1.02, D, defines rock as follows:

1. The word "rock" wherever used as the name of excavated material shall mean

sound bedrock, ledge, and boulders, concrete and masonry structures or portions thereof, required to be removed from the excavation. The surface of sound bedrock shall be taken below the level of any rock disintegrated or fractured to such an extent to be removable by hand tools, power equipment, or other mechanical means (Ex. 8).

14. Contract Section 01025, 1.02, B, sets forth unit prices for rock excavation and what steps are to be taken when dealing with rock excavations in order to receive payment:

1. Excavation of rock in excess of one cubic yard, if ordered in writing by the Architect with the prior written approval of the Division of Capital Planning and Operations, will be paid for in addition to the lump sum Contract Price at the rate of \$37.00 per cubic yard in open cut, and \$55.00 per cubic yard in trenches, both measured in place anywhere within the Contract limits as defined on the plans or any duly authorized modifications thereto, except in areas where blasting is not allowed, in which cases payment shall be in accordance with Article VI. The payment shall cover all costs relating to such ledge excavation, including blasting, removal and satisfactory disposal of the excavated material, overhead, superintendence, profit, and all related costs as prescribed under Article VI of the Contract.
2. Measurement and payment for rock excavation will be made for:
 - a. Foundations
 - b. Pipes
 - c. Any unforeseen rock excavation encountered and required to be removed for the construction of work defined on the plans and required under this Contract, as being within the Contract limits shall be paid for by measuring said excavation in its

original position to the limit of the clearly defined vertical construction lines and the depth required by the new construction.

- d. Where in the opinion of the Architect blasting will not be allowed, the rock removal shall be paid for under Article VI of the Contract. The method of removal shall have prior approval of the Division of Capital Planning and Operations before proceeding (Ex. 8).

15. In regard to additional gravel borrow and unit prices, Contract Section 01023, 1.02, C, contains the following provisions:

1. The General Contractor shall provide additional gravel borrow when such is not available on the site for any unanticipated filling or backfilling requirements if ordered in writing by the Architect with the prior approval of the Division of Capital Planning and Operations.
2. Payment for additional gravel borrow will be made in addition to the lump sum Contract price at the rate of \$12.90 per cubic yard, measured in place, which shall include all costs relating to the furnishing, installing, compacting, overhead, superintendence, and profit (Ex. 8).

16. At Contract Section 02200, Earthwork, 3.03, General Excavation, E, unsuitable materials are listed:

1. Topsoil, loam, brown clay, black fill, and brown sand.
2. All peat, organic soil, or soil containing sod, roots, or any other material subject to decomposition or decay.
3. All soft, spongy, or compressible soil.
4. All fills and buried building materials which do not conform to the requirements specified herein for fill materials.

5. Cinders (Ex. 8).

17. At the same Contract Section 02200, 3.03, included among the general conditions applicable to excavation work are the following provisions:

B. The Architect shall be allowed reasonable time to observe the bottom of all excavations prior to commencement of filling work, and foundation and footing work to verify the bearing value of the material encountered.

C. If acceptable bearing is not encountered at depths indicated on the Drawings, do not proceed further until instructions are given by the Architect, and necessary measurements made for the purpose of establishing additional volume of excavation. Placing of fill on unsuitable materials shall not be done.

D. Should the Architect, with prior written approval of the Commonwealth, direct the unsuitable material be removed beyond the payment lines, the Contract amount will be adjusted in accordance with the applicable unit prices specified under Unit Prices of the Contract (Ex. 8).

18. Contract Section 02200, 3.03, K, addresses excavation for unanticipated subsurface conditions, other than for rock excavation, and refers back to the Unit Prices Section of the Contract in regard to payment for such. At 3.07, Unanticipated Sub-Surface Conditions, A, the same provisions are set forth for additional excavation other than of rock, as are set forth in the Unit Prices Contract Section at 1.02, A. At 3.07, B, rock excavation provisions are set forth which contain the same information found in the Unit Prices Contract Section at 1.02, B, as revised by Addendum No. 4. At 3.07, C, additional gravel borrow provisions are

set forth which contain the same information found in the Unit Prices Contract Section at 1.02, C (Ex. 8).

19. In regard to blasting for rock excavation, the Contract permits such only with permission. (See, Contract Sections 01023, 1.02, B, 3; 02200, 3.07, B, 1; and, 01025, 1.02, B, 2). There were tunnels in the area around the site of the new kitchen at the Domestic Building. Contract Section 01010, Summary of Work, 1.31, A, addresses protection of such tunnels:

During the course of construction,
all tunnels shall be totally protected
from damage of any nature. The sequence
of procedure shall be satisfactory to
the Institution Authorities (Ex. 8).

20. Although Peabody never sought permission to blast for the excavation work at the site for the new kitchen addition at the Domestic Building, permission to blast would not have been given by the Architect or by DCPO.

21. Biasizzo Construction Co., Rev-Lyn's Sub-Contractor was excavating the unsuitable material subject to the ATP in January 1990. They were not using extra large excavator equipment. The unsuitable material was then dumped into trucks of R.J. Urban Construction that had volume capacities of 20 and 15 cubic yards. Large pieces of rock and ledge were encountered which damaged the teeth of the bucket on the excavator. The large rock and ledge pieces had jagged edges which left large areas of air pockets in the trucks. The pieces could be as large as 3 to 4 feet in diameter or as small as 1 to 2 feet in diameter. There was little softer

material available to cushion the large pieces in the trucks.

22. During the excavation, a hoe-ram was used at times to break up large hard rock and ledge. The excavation lasted into mid-March 1990. Most all of the material removed was large rock and ledge pieces as opposed to loam, clay, sand, topsoil, cobble or rubble. Most all of the material removed could not be removed by use of hand tools or with small backhoes and bobcats.

23. On January 4, 1990, Peabody discussed with DCPO various problems and delays encountered on the project. Included was ledge at the site of the new kitchen addition. Mr. White relayed these problems, including the ledge issue to Mr. Murphy by correspondence of January 10, 1990. Mr. MacMillan was also sent this information. As of January 10, 1990, Peabody had not decided whether to seek a change order for encountering the ledge.

24. On January 16, 1990, a job meeting was held where the problems and delays Peabody found by January 4, 1990 were discussed. The job meeting minutes prepared by the Architect discuss the matter of ledge found at the Domestic building addition, as follows:

Once the material was encountered
the contractor was advised to
proceed as per the contract (Ex. 12).

25. By mid to late January 1990, backfilling had commenced as excavation in a designated area ended. The cold weather and frost conditions made backfilling difficult producing "frost acculuation before completion of

compaction." Compaction was difficult due to an "ice glaze formation rate [which exceeded] ... the ability ... to satisfactorily compact the gravel area." The backfilling involved "gravel application ... with a maximum of 100 cubic yards per day versus the ability to place 750 cubic yards per day under normal conditions." Rev-Lyn opined the excavation work was "extending the project by an additional six weeks." Rev-Lyn was backfilling with additional gravel due to the ATP and bringing "the area to the foundation grade and then to slab grade." The compaction would be protected by a top 6 inches of gravel which would become frosted and frozen by the next day and would have to be removed. Rev-Lyn informed Peabody by letter of January 19, 1990 about these conditions and that it wanted additional compensation (Ex. 16).

26. As originally estimated, prior to the discovery of the additional material that had to be removed which was the subject of the ATP, Peabody contemplated performing the excavation work during the winter. That Contract excavation work was minimal, with a minimal amount of backfill involved.

27. Mr. White sent Rev-Lyn's January 19, 1990 letter to Mr. Murphy by January 22, 1990 (Ex. 16).

28. Peabody was asked to produce a revised schedule which was done for a February 1, 1990 meeting. Mr. White presented information that ledge had been encountered at the site of the addition to the Domestic Building, and that very cold, snowy and rainy weather were making backfilling difficult. Peabody did not assert it was going to seek a

change order for the ledge or for the backfilling (Ex. 14).

29. All the change order work was finished at the site of the new addition to the Domestic Building by April 1990. Peabody did not keep time and materials records.

30. In the areas surrounding the Domestic Building and the site for the new kitchen addition, there was rock and ledge encountered by Peabody in the course of the earthwork performed (See, Ex. 18). These were at areas where blasting was not allowed. ATPs were entered into in February, March, and April 1990 on the basis of:

A sum "NOT-TO-EXCEED" \$
based on Time & Material records
kept by Resident Engineer and
Contractor in accordance with the
Contract and Bulletin No. 13. General
Contractor's and Subcontractor's
quotes considered as "NOT-TO-EXCEED"
prices (Ex. 17).

Peabody's records revealed to DCPO the types of equipment used for how many hours each day change order work was performed along with a total cost of equipment (Ex. 17).

31. Mr. MacMillan observed excavation work occurring at the site of the new addition to the Domestic Building when he was on site for weekly job meetings. He never saw large amounts of rock and ledge being removed. He saw bricks, rubble, stones, and sand. He did not see a hoe-ram being used. His observations were for 15 to 20 minute periods. He was never asked to observe or measure the rock or ledge being excavated.

32. Alben Hebert, the Resident Engineer on the project, observed the excavation at the site of the new addition of

the Domestic Building. He saw only rubble, bricks, broken up stones and some topsoil. He did not see any significant amount of rock or ledge, and was not asked to measure rock or ledge. He saw a hoe-ram used for only about half a day on a small section of the excavation site.

33. At the March 29, 1990 job meeting, "DCPO requested the GC [Peabody] to submit their CO [change order] for unsuitable material removed at the Domestic Building kitchen." (Ex. 12).

34. No change order was filed soon thereafter due to problems with gathering supportive data between Rev-Lyn and Peabody.

35. The change order was filed on or about August 27, 1990, seeking \$113,659.00 for removal of the material and for replacement with compacted structural fill as based on the ATP of December 29, 1989. No extra days were sought in connection with the performance of this work through this change order request. Peabody's breakdown was \$81,659.00 for ledge removal using 2,207 cubic yards at \$37.00 per cubic yard; and, \$32,000.00 for structural backfill using 1,600 cubic yards at \$20.00 per cubic yard.

36. In using 2,207 cubic yards of excavation of ledge, Peabody relied on a series of surveying readings indicating the topography of the excavation site done by Richard Hasset, a Rev-Lyn Project Manager. The depths were multiplied by the areas involved to get the volume. The height of elevation was established at the start of excavation once the existing

slab was off. The bottom of the excavation was established once excavation was over in or around mid-March 1990 (See, Exs. 4 and 5).

37. By memorandum of October 1, 1990, Douglas B. Footit, the Landscape Architect consultant for deCastro & Nelson Associates, produced calculations in regard to the total area of excavation at the site for the new kitchen addition to the Domestic Building. Mr. Footit was never on site to witness the excavation. He relied upon the "contractor's spot grades taken after excavation, contractor's profiles and the resident engineer's observations." His calculation was:

Assumed: Total area of excavation
= 100' x 100' = 10,000 sq.ft.

Average depth of excavation 4.66 ft.
10,000 sq.ft. x 4.66' = 46,600 ft./27
= 1726 cys

Above excavation includes the following miscellaneous excavation:

Pier footings	160 cys
Spread footings	98 cys
Utility trenches	12 cys
Elevator	18 cys
	<u>288 cys</u>

Note: Total excavation of 1726 cys is broken down as follows:

From 0' to 4" - 0" (80%)	= 1380.8 cys
From 4" to 0" and below (20%)	= <u>345.2 cys</u>
Total	1726.0 cys (Ex. 12)

38. Mr. Footit revised and further explained his calculation by memorandum of October 25, 1990. He explained how he relied on Mr. Hasset's readings. He then explained how he made deductions from the total excavation quantity. He used a 10% contingency. His revised calculation is:

Total excavation before deductions	1865 cy
<u>Deductions</u>	
Footing and Foundations	197 cy
Utility Trenches	66
Elevator Pit	37
Allowance for Depressed Areas and Pier Footings	55
Total deductions	<u>355 cy</u>
Total excavation before deductions	1865 cy
Total deductions	<u>355</u>
	<u>1510 cy</u>
Plus 10% Contingency	<u>150</u>
Estimated total excavation of unsuitable material	1660 cy (Ex. 6)

39. Mr. Hebert recommended that only \$39,779.00 of the \$113,659.00 change order amount be approved. His reasons for reducing the amount are:

(a) Quantities include overexcavation beyond payment lines as stated in Section 01025 para. 1.02, B-2a.

(b) Costs have been submitted as ledge unit prices. All material removed in this area was removed by power equipment and as such does not meet the criteria as stated in Section 01025, para. 1.02, D-1.

(c) Prices for compacted gravel are not as stated in Section 01025 para. 1.02, C-2.

He recommended the following calculation using quantity calculations of the Architect and unit prices set forth in Contract Section 01025:

Excavation			
Above 4 feet	1444 cu.yds.@	\$6.50	\$9,386.00
Above 4 feet	216 cu.yds.@	\$10.00	\$2,160.00
	Total excavation		<u>\$11,546.00</u>
Compacted Gravel	1660 cu.yds.@	\$12.90	\$21,414.00
	Total Material		<u>\$32,960.00</u>

He then added in the General Contractor's Overhead and Profit

of 20% and the General Contractor's Bonds for a total of \$39,779.00. He found the change order work had not been done under protest (Ex. 7).

40. Peabody's responsibility for the Contract work of excavating for the foundation and footings for the new kitchen addition would not commence until the backfilling with compacted structural fill, pursuant to the ATP was accomplished. This is how Peabody proceeded with this Contract work.

Conclusion

The issues presented by this appeal involve a determination of: the quantity of material excavated; whether the material excavated was ledge or met the definition of rock under the Contract, or whether the material satisfied the definition of unsuitable material under the Contract; the quantity of compacted structural backfill material; which unit prices are appropriate to apply to these materials; and, whether Peabody gave sufficient notice to DCPO concerning new conditions not contemplated by the ATP of December 1989. The change order does not seek additional time, but Peabody has reserved its right to seek extra time in connection with this change order work.

The evidence presented concerning the quantity of material which was removed subject to the ATP of December 1989, shows that Peabody's reliance on Mr. Hasset's data was appropriate. The figure of 2,207 cubic yards is within

Mr. MacMillan's 2,222 cubic yards estimate for the ATP. It is in line with the estimate of Mr. Urban who trucked the material. The evidence shows that even Mr. Footit's estimate of 1,865 cubic yards and Mr. Glazer's 2,134 cubic yards are fairly close to 2,207. The 2,207 figure is supportable, reliable, and the most sound figure to emerge from the record.

In this regard, DCPO maintains that deductions must be taken from the overall total for the Contract required excavation work. Peabody's evidence as to why this should not occur is credible and reasonable. Peabody's Contract required excavation work assumed existing conditions that were found to be inaccurate. The ATP or change order excavation and backfilling was meant to prepare the area for the required Contract excavations for the foundation and footings. Hence, no deduction from the 2,207 cubic yards should be taken.

The issue of whether the material encountered following the ATP was rock or unsuitable material, is resolved by the evidence concerning the course of events. Mr. Urban and Mr. Biasizzo who were present performing the work, credibly and consistently testified that the most abundant material encountered fit the Contract definition for rock excavation. Although Mr. MacMillan and Mr. Hebert observed the excavation work at times, they clearly were not focused on the work. Even after the existence of ledge was asserted at meetings by Peabody, they never took or sought to take measurements of

the material. Although they may have had no obligation to take such measurements, the fact that neither person was close to the excavation work diminishes the weight of their testimony on this issue.

The Contract definition of rock, as DCPO's witnesses contend, should not apply to pieces of material that otherwise meet the definition of rock, if such matter could be removed by equipment that would be used for ordinary excavation. In this regard, the record shows that ordinary equipment was used but not without great difficulty; the teeth on the excavator's bucket broke and the trucks had large empty spaces without softer material available for bedding. The record also shows a hoe-ram was used on the ledge encountered. This evidence supports a determination that the bulk of the excavated material was rock.

The issue of Peabody's notice to DCPO regarding conditions unforeseen by the ATP of December 1989; the ledge encountered and the complications with backfilling due to winter weather, is central to the merits of the change order.

The record shows that at least some discussions occurred at job meetings regarding ledge being encountered. The record also shows that during the excavation, Peabody never formally asserted that it found the condition to merit a change order despite its awareness that the ATP had contemplated only unsuitable material and not rock. Moreover, by the terms of the Contract specifications, once rock is encountered, notice must be given to DCPO to trigger

either measurements of the rock, or if no blasting could be done, then the application of Article VI provisions.

Triggering Article VI means engaging in the ATP process.

Since ledge was encountered on the project in various other locations and these discoveries led to ATPs which used a time and materials basis for change order awards, Peabody was clearly aware under these particular circumstances of what to do once ledge was encountered.

Peabody has demonstrated entitlement to use 2,207 cubic yards of excavation for additional compensation. Peabody has not shown its entitlement to use the Contract unit prices for rock excavation because it failed to timely and adequately notify DCPO that it found the material not to be unsuitable material but rock. The Contract requirements, from the specifications and from the Article VI general condition sections, cannot be overcome by Peabody's proof that it actually encountered rock. Moreover, the record does not show DCPO has waived these contract conditions by its actions on the change order. Since the rock excavation unit prices cannot apply, the \$6.50 and \$10.00 unit prices are applicable to the 2,207 cubic yards of material removed.

Concerning the notice provided regarding problems with backfilling, the record shows sufficient notice to DCPO of a new unforeseen condition over what the ATP contemplated. The January 19, 1990 letter of Rev-Lyn contains sufficient notice, and was forwarded to the Architect. It was sent when the problems arose. It clearly explained what the precise

problems were. The record reveals no adequate response from the Architect or from DCPO to address these specific concerns was received by Peabody.

The record demonstrates that the backfilling operation was more difficult than what was contemplated by the ATP. The ATP did not give consideration to the problems that would occur with extensive backfilling of structural fill during a damp and cold winter. Nevertheless, Peabody never had time and materials records maintained on the backfilling operation. The \$20.00 amount has not come from the Contract Section on unit prices. Therefore, the Contract unit price must be employed in the absence of some other negotiated unit price.

The primary problem with the backfilling operation may have been a large expenditure of additional time involved. If Peabody seeks a further recovery for delays it would not be entitled to additional compensation but only to additional Contract days. This is because of Contract Article V, 3, Delays, which states in pertinent part that;

... the contractor shall not be entitled to damages on account of any hindrances or delays, avoidable or unavoidable; but if such delay be occasioned by the awarding authority, the contractor may be entitled to an extension of time only, in which to complete the work, to be determined by the Designer (Ex. 8).

From the evidence presented, the record contains insufficient proof to find a precise number of additional Contract days due to complications with the backfilling operation. Rev-Lyn's January 19, 1990 letter presents the

type of problem encountered as does the testimony, but that evidence does not support a particular number of additional days. Rev-Lyn's assertion of 6 additional weeks is not sufficiently supported by the record.

In summary, Peabody is entitled to use 2,207 cubic yards of excavation, but cannot use the unit prices for rock. The unit prices of \$6.50 and \$10.00 should be employed, using Mr. MacMillan's 60%, 40% breakdown from the ATP. Peabody cannot use \$20.00 as a unit price for backfilling. The case is remanded to DCPO for recalculation of the change order. If Peabody wants to seek additional days for the backfilling work, then a new change order should be filed with DCPO to permit DCPO to review the request.

SO ORDERED.

DIVISION OF ADMINISTRATIVE
LAW APPEALS

Sarah H. Luick

Sarah H. Luick, Esq.
Administrative Magistrate

DATED: *2/20/92*

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Division of Administrative
Law Appeals

Suffolk Construction, Co. Inc.,
Appellant

CP-91-1408

v.

CP-91-1628

Division of Capital
Planning and Operations,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

Gerald L. Solomon, Esq.
Division of Capital
Planning and Operations
One Ashburton Place
Boston, MA 02108

Administrative Magistrate:

Christopher F. Connolly

DECISION

The Appellant is appealing the denial of two change orders submitted on behalf of its Lath and Plaster Subcontractor, JRJ Construction Co., Inc. for the installation of plaster ceilings in the second floor corridor of Building C and a stairway of Building B at the New Medium Security Facility at New Braintree. At the hearing Joseph Shena, project manager and estimator for JRJ and Robert Juusola, project manager for HMFH Architects, Inc., testified. Thirteen documents were entered into the record (Exhibits 1-13).

The dispute in this case arises as a result of a discrepancy in the plans. The specific ceiling plans require the installation of cement plaster ceiling with heavy duty lath. The finish schedule calls for the installation of rated gypsum wallboard in the corridor ceiling and no work to the stairway ceiling. Based upon the testimony of the witnesses and the documentary evidence, I make the following:

FINDINGS OF FACT

1. Joseph Shena reviewed the plans and specifications required for the lathe and plastering sub bidder for such work at MCI New Braintree, Project P88-12 #1 on behalf of JPJ Construction, Inc.

2. In reviewing the plans, Mr. Schena noticed numerous discrepancies as to the requirements under the ceiling plans compared to what was shown on the finish schedule.

3. The finish schedule for corridor C232 (second floor) indicates that a rated gypsum wallboard ceiling was to be installed. The finish schedule for corridor C332 (third floor) indicates that a plaster ceiling was to be installed.

4. The reflected ceiling plan, A 11.8R requires the installation of rated suspended cement plaster ceiling system with heavy duty lath in both the second and third floor hallways of Building C.

5. The finish schedule for stairway G21 indicates that no work was to be performed upon the ceiling.

6. The reflected ceiling plan, A 11.4R requires the

installation of rated suspended cement plaster.

7. The contract entered into requires all prospective bidders to submit in writing any questions as to the interpretation of the "plans, specifications..." at least ten days prior to the date set for receipt of filed sub bids.

8. The contract requires that the contractor shall "carefully compare all specifications, plans...and at once submit all cases of doubt or discrepancy to the Designer for adjustment."

CONCLUSION

The Petitioner is not entitled to prevail in its appeal of either of the change orders. The provisions of the contract impose an affirmative obligation upon the contractor when there is a discrepancy or confusion in the plans. Here, the discrepancy between the finish schedule and the ceiling plans was known by Mr. Schena prior to preparation and submission of the bid. He had at least the duty to seek a clarification prior to submitting his bid. He cannot now say that since he relied on the finish schedule and not the ceiling plans when preparing his bid, he is now entitled to a change order. That would be unfair and would unjustly benefit the contractor.

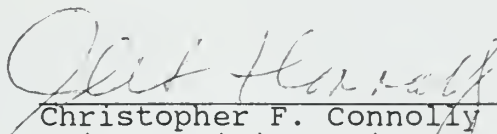
Furthermore, a reasonable person would rely upon the specific plans covering the work in question, the ceiling plans, and not a summary of the finish areas for the entire project. Thus, I conclude that the work performed was included in the contract and was "owned" by DCPO.

Suffolk Construction Co. Inc.
CP-91-1408; 91-1628

The decision of the Deputy Commissioner in denying the two change order requests is affirmed. These appeals are dismissed.

So ordered.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Christopher F. Connolly
Chief Administrative Magistrate

Dated:

Aug 6, 1992

SEP 02 1993

University of Massachusetts
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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative
Law Appeals (DALA)

Morganti-Pomco, Docket No. CP-92-776
Appellant

v.

Division of Capital Planning
and Operations (DCPO),
Respondent

Appearance for Appellant: Joseph A. Pisarri, Esquire
Corwin and Corwin
One Washington Mall
Boston, MA 02108

Appearance for Respondent: Gerald L. Solomon, Esquire
DCPO
One Ashburton Place
Boston, MA 02108

Administrative Magistrate: Judithann Ojerholm

DECISION

Pursuant to M.G.L. c.30 s.39Q, the Appellant, Morganti-Pomco (MP), a joint venture general contractor, acting on behalf of its electrical subcontractor (Ostrow), is appealing the credit change order in the amount of \$95,569.00 unilaterally issued by DCPO on construction of a new state prison at MCI Shirley. (Exhibits 9 and 10). The appeal was timely filed with DALA on October 5, 1992. (Exhibit 12). A hearing was held on March 8, 1993 at the offices of the Division of Administrative Law Appeals (DALA), Room 904, 100 Cambridge St., Boston, pursuant to M.G.L.c. 7 s. 4(H) and 801 CMR 1.10 et seq.

At the hearing, fifteen (15) exhibits were entered into evidence. Philip Ostrow, the electrical subcontractor and

Vice President of Ostrow Electric, and Frank Kneeland, Chief Electrical Engineer and Vice President in Charge of Electrical Engineering at Anderson Nichols Consulting Engineers, both testified during the presentation of the Appellant's case. Mary Mahoney, DCPO Project Manager, testified for the Respondent. Three (3) tapes were made of the proceedings. The record was left open for the filing of post-hearing briefs. The last of these was received on March 31, 1993, thereby closing the case record.

FINDINGS OF FACT

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. On or about April 13, 1990, DCPO entered into a contract with Morganti-Pomco, a joint venture, for the design, manufacture and installation of a modular correctional facility at M.C.I. Shirley a/k/a P 89-20, Contract No. 1.

2. DCPO issued a Request for Proposals (RFP) for the Project. Said RFP, supplemented by DCPO-issued drawings and specifications, included information concerning the requirements of the electrical distribution system.

The RFP gave general performance criteria in the electrical specification and sketch, both prepared by Anderson-Nichols on behalf of DCPO. The specifications included a description of the twelve pad-mounted transformers, each with a connection on both sides, to the

transformers or power source next to it. Current would run in either direction, so that a malfunction at any point could be isolated, the current shut off along that line, and the remaining transformers fed from either side of the loop. The eleventh and twelfth transformers were not part of the loop.

The sketch also showed a pair of loop feed electrical switches on each transformer, between the transformers and the buildings, in order that power be maintained to all buildings through backfeeding of the electrical power in the event of a fault in the system. These switches are depicted by the broken lines in the drawing. In addition, each transformer was drawn with a radial feed switch which would cut off current from the loop to the transformer itself without affecting the loop in order to enable one particular transformer to be repaired at a time, if necessary. (Exhibits 1 and 2).

3. The radial feed switch was also required by the Electrical Code.

4. A transformer is a device used to raise or reduce voltage from one point to another. Power is taken from the utility source; and the voltage is lowered in order to be utilized throughout the structure.

5. Loop feed switching can be accomplished by two types of switching devices: LBOR, or load break oil rotary, a single mechanism installed within the transformer which has a handle that toggles between open and closed positions, similar to a circuit breaker; and, LBE, or

load break elbow. This is external to the transformer itself and operates like a plug where the electrical current is disconnected by pulling the elbow out of a bushing well in the transformer.

The LBE is used to disconnect power only in an emergency situation. This can be done only when the power to the entire facility is turned off. LBE's may also be used to provide a transformer with dead front construction.

6. LBE's cannot be used with radial feed switches.

7. LBOR loop and radial switching may only be accomplished by means of a combination loop/radial switch.

8. The RFP specifications also required MP to submit shop drawings of the proposed material for DCPO approval. (Exhibit 1).

9. The proposal of MP also contained a sketch that substantially resembled the Anderson-Nichols sketch in that it showed the same loop feed configuration with loop feed switches. These switches are shown by use of an industry-recognized switch symbol.

10. MP submitted a proposed electrical drawing and specification for DCPO approval. These showed an electrical distribution system that met the performance criteria of the RFP. The specification provided in pertinent part:

An LBOR (Loadbreak Oil Rotary) switch is to be gang operated and suitable for either radial or loop feed switching as shown on the drawings...

(Emphasis added).

The drawing contains two markings of the letters "LBE"

per transformer between the transformers and the buildings. No other loop feed switches of any type are indicated anywhere on the drawing. No definitions or legend were provided indicating the meaning of such letters. (Exhibits 3 and 4).

11. The drawing was submitted to DCPO and approved by Project Manager Mary Mahoney, who is not an electrical engineer. DCPO did not utilize any electrical engineer on the project, except to draft the RFP. Once the contract was awarded, DCPO relied on the expertise of the electrical engineering firm hired by MP, Shooshanian Engineering (SEA).

12. Following the approval of the plans and specifications, the electrical subcontractor, Ostrow, submitted its transformer shop drawings for approval. These shop drawings identified the various transformers and hardware to be provided. Transformer submittals included Guide Form Specifications prepared by the manufacturer, General Electric Co. (GE). These were generic, pre-printed forms applicable to several types of transformers. By filling in various blanks and checking off particular boxes on the forms, General Electric described the features, options and performance capabilities of those specific transformers to be supplied to the project. In ten of the twelve shop drawings, there was an indication in the box next to loop feed switches that these would be installed. These marks were made by GE and then submitted to DCPO for approval. Two transformers were described as having radial feed

switches. On one of these two Guide Form Specifications, SEA crossed out the loop feed switch notation and marked the radial feed switch box with an "X", an arrow, and the word "yes".

These drawings also contained a picture and a detailed description of the loop feed switch. These shop drawings were approved by DCPO. (Exhibit 6).

13. Loop feed switches, radial switches and the combination of loop/radial switches, which perform both functions, are all LBOR's. GE does not manufacture transformers with LBE's. If a customer wants the LBE switching, GE provides bushing wells in the transformer and the electrical contractor installs the LBE's on the job.

14. On November 1, 1990, another set of submittals was sent to DCPO which contained SEA's comments. The submittals were approved "as noted" by Mary Mahoney; and, returned to MP. (Exhibits 7 and 8).

15. Thereafter, transformers were ordered by Ostrow; and, shipped by GE. LBE's were then added by Ostrow. The transformers were installed without loop feed switches.

16. On August 19, 1992, DCPO notified MP that it had rendered a decision to institute a unilateral credit change order in the amount of \$95,569.00 to cover the estimated cost of advertising, bidding and installing LBOR Loop-Switched transformers in place of the LBE's. (Exhibit 9).

CONCLUSION

After a careful review of all of the testimony and documents in this case, I have concluded that the Appellant is not entitled to prevail in this appeal. The Appellant did not meet its burden of proving that the equipment it furnished and installed, a loop feed electrical distribution system with radial switches and LBE's, was ever approved or purchased by DCPO.

The earliest contract documents, the RFP and the specifications, very generally defined the electrical system but left its actual design to be described further in the plans and shop drawings. The specifications did indicate a loop feed system with either radial or loop feed switches.

The next document reviewed was the proposed electrical construction drawing. This did not depict any specific types of switches which are commonly identified on plans via use of industry-wide symbols.

Admittedly, the letters "LBE" were included on the drawing between the transformers and the buildings. However, this fact, and that of DCPO approval, are not dispositive in the Appellant's favor. No definitions or legend were included to reflect the meaning of these letters. Another reasonable interpretation of the term "LBE" could have been dead front construction.

DCPO is correct in its contention that, without any designations on the drawing, it would have been mere

speculation on its part to assume that the "LBE"s were the means of disconnection. This is especially true in this case where the Appellant's engineering and design teams had specified in paragraph 1600-12 s. 1a that an LBOR switch would be installed which would be suitable for either loop feed or radial switching.

The ambiguity created by this very apparent contradiction within the contract documents must necessarily be interpreted against the Appellant as the author of the documents, notwithstanding the wanting of credentials of the DCPO Project Manager who approved the drawing. If anything is to be made of Ms. Mahoney's assignment to the job, it is that under the circumstances in this case, the Appellant should have exerted greater efforts to communicate in a lucid, specific manner concerning all of the documents.

The final and most specific documents were the shop drawings. These identified the various transformers and the respective hardware to be installed. It is in these documents that the switches to be supplied and installed were detailed. DCPO is correct in its contention that ten out of twelve transformers were designated to be installed with loop feed switches. Two transformers were described as having radial switches. One of these last two transformers was actually outside of the loop in question here. As such, the designation on the drawing was correct. It was reasonable of DCPO to infer that only one of the shop drawings was erroneously marked - the second shop drawing which was

designated to have a radial feed switch. This is especially true in light of the fact that the shop drawings contained a picture with a detailed description of the loop feed switch.

Apart from the handwritten notations on two of the shop drawings relative to radial feed switchés, the Appellant exerted no effort to specify via letter or phone conversation that GE or its own staff at SEA made any errors on the original shop drawings even though GE does not manufacture transformers with LBE's itself; but rather, provides bushing wells at a customer's request.

Next, there is no evidence, aside from comments of counsel that someone at SEA made the notations. Finally, there is absolutely no support for the contention that any changes noted were applicable to all of the transformers.

For all of these reasons; and, the highly compelling policy consideration that an electrical distribution system in a correctional facility which requires disconnection of all of the power in an emergency is undesirable; it is more than reasonable to conclude that DCPO contracted for a loop feed electrical system which included loop feed switches. An appropriate system of distribution for such a facility is one wherein a malfunction can be isolated, the current shut off and the remaining transformers fed from either side. There is no evidence that DCPO wanted any system other than the latter from the outset.

The credit change order in the amount of \$95,569. for replacement of the existing transformers with those with

loop feed switches is hereby affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS
By,

Judithann Ojerholm
Administrative Magistrate

DATED:

May 25, 1993

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

GOVERNMENT DOCUMENTS
COLLECTION

Appeal of:

The Ryan Company, JUL 29 1993
Appellant

v.

University of Massachusetts
Depository Copy

Docket No. CP-92-325

Middlesex County Commissioners,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Office of Middlesex
County Commissioners
New Superior Court House
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East Cambridge, MA 02141

Administrative Magistrate:

Sarah H. Luick, Esq.

DECISION

Pursuant to G.L.c.30, s.39Q, the Appellant, The Ryan Company, is appealing the inaction of the Middlesex County Commissioners on its change order request as General Contractor in a Contract with the County Commissioners to remove and disposal of certain PCB transformers. (Exs. 3) The appeal was timely filed. (Ex. 2) A hearing was held February 5, 1993 at the offices of the Division of Administrative Law Appeals, 100 Cambridge Street, Room 904, Boston, MA, 02202, pursuant to G.L.c.7, s.4H.

Various documents are in evidence. (Exs. 1-19) The

Appellant presented the testimony of Michael Grady, Vice President of The Ryan Company and Project Manager on this Contract. The Respondent presented the testimony of William Sullivan, the Middlesex County Electrician/Electrical Supervisor of Maintenance and Repair with the Division of Capital Facilities Planning. Both parties made arguments on the record.

Findings of Fact

1. The Ryan Co. is the General Contractor in a Contract with the Middlesex County Commissioners for the removal, disposal and replacement of PCB transformers at the New Superior Courthouse Building in Cambridge. It was the lowest bidder by \$30,000.00 to \$40,000.00. (Ex. 12)

2. The Ryan Co. had removed and replaced hundreds of PCB transformers before bidding on this project. Michael Grady, who has been with The Ryan Co. for 17 years and has extensive experience with this kind of work, put together this bid.

3. Mr. Grady worked with The Ryan Co. estimator, reviewed the Contract specifications, and performed an on-site inspection of the transformers.

4. The specifications were developed under the supervision of the Middlesex County Director of Capital Facilities Planning, Sal Fulchino, who served as Project Engineer.

5. Contract Section 1.2 instructs that if there is a

conflict "between this specification and the contract document, or plans, the more stringent shall apply." (Ex. 1)

6. Contract, Section 4.1.1., calls for the removal and disposal of three transformers with PCB fluids. Section 4.1.1.2., tells the General Contractor to;

... examine the equipment to be removed and familiarize himself with all conditions (including actual transformer dimensions, weights and gallons of fluid) which may affect his work. Failure to do so shall not lessen his responsibility or entitle him to additional compensation for work not included in his estimate. (Ex. 1)

7. During the on-site inspection The Ryan Co. found the serial numbers on the transformers matched the serial numbers listed in the Contract specifications. The Ryan Co. measured the dimensions of these transformers and examined the nameplate information to check it against the listed information in the specifications as to weight and gallons of fluid.

8. Contract, Section 4.1.1.1., contains the following pertinent description of the transformers:

Manufacture: ITE
Serial Number: (16874) (16875) (16876)
KVA Rating: 1000
Fluid Type: Non Flammable Fluid
Voltage: 13,800 - 480Y/277
Approx. Weight (Full): 7,200 lbs. each
Gallons of Fluid: 203 each
Approx. Dimensions: W=50", H=62", D=64"
(Ex. 1)

9. The name plate information differed from the specification listings as to KVA rating (more data from the nameplate), weight of the oil (not listed in the

specification, but was on the nameplate), gallons of fluid (the nameplate listing was greater), and impedance rating (not listed in the specification, but is used by the electrical designer in valuing the circuit protector). (See, Ex. 14)

10. The Ryan Co. did not sample the fluid to learn the exact PCB contamination level. No sampling information was provided in the specifications. Sampling of the fluid was a matter not addressed in the specifications. As is a standard practice in bidding on such work, The Ryan Co., took the amount of gallons off the nameplate and divided it by the weight of the oil as taken off the nameplate to arrive at 6.58 lbs. This calculation yielded a very low level of contamination.

11. It is a standard practice in the trade not to do pre-bid sampling and to rely on the nameplate information, particularly where such data is not viewed as inconsistent with the specifications. Drawing out fluid could do damage to the transformers as all bidders would need to be given the same opportunity, and removing too much fluid could make the existing transformers inoperable. Working with such fluid is dangerous, and insurance for such sampling would not typically be obtained just to bid on a project.

12. Contract, Section 11 addresses disposal of PCB fluids and equipment. The specification addresses separately PCB concentrations of less than 50 ppm, concentrations between 50 to 500 ppm, and in a general way

concentrations of 50 ppm or greater. The specifications do not address disposal of PCB fluid and equipment with contamination levels over 500 ppm. (See, Ex. 1, Section 11)

13. If the contamination level is less than 50 ppm, it is not subject to strict regulation, but it is not unusual to address disposal of such fluid in specifications anyway.

14. The Ryan Co. used a bid of \$6,000.00 for the removal of the transformers and fluid based on a very low contamination level. (Ex. 15)

15. A pre-bid conference was held along with a tour of the site of the transformers. The Ryan Co. was among the bidders in attendance. No questions were presented by The Ryan Co. or by other bidders as to a need to sample the fluid, or about the contamination level of the fluid, or about the accuracy of the information on the nameplates. Addendum No. 1 was produced following this meeting. Nothing there addresses any issues concerning the contamination levels of the fluid in the transformers. (See, Ex. 11)

16. After the Contract award, The Ryan Co. had samples drawn from the transformers for testing to determine the exact levels of contamination. This is a customary practice so test results can be given to the disposal company. With low level contaminated fluids, disposal costs are low including more sites able to accept the fluids and equipment. If the contamination level is very high, then the costs are much greater. The fluids are incinerated in an EPA approved PCB incinerator with the transformer disposed of the same way

or by burial in EPA approved landfill cells after being drained and flushed.

17. The testing was done by Jerry's Electric, Inc. of Colman, S.D. Such testing involves a very standard method with variances among test results not typically great or significant.

18. The test results from Jerry's Electric of April 5, 1991 showed highly contaminated PCB levels in each of the transformers, or pure PCB by industry standards. (See, Ex. 1)

19. Shortly thereafter in May 1991, The Ryan Co. notified the Middlesex County Electrician, William Sullivan, about the test results, providing him with a copy of Jerry's Electric results. Mr. Grady also informed Mr. Sullivan that the transformers contained pure PCB, and that The Ryan Co. would be seeking change orders to cover the added costs of removal and disposal. Mr. Grady notified Mr. Sullivan that the nameplate information was incorrect by indicating a very low contamination level at only approximately 7 lbs. per gallon.

20. The Ryan Co. received a requote from its original subcontractor, TSI based on this new test data. TSI requested the work at over \$25,000.00. The Ryan Co. then sought other bids for such work, and obtained low bid of \$13,526.00 from Transtec Environmental, Inc.

21. The Ryan Co. forwarded this new price to Mr. Sullivan and requested a change order for the increased cost of disposing of the fluid. (See, Ex. 7)

22. The Ryan Co. did not receive a response to their request.

23. The removal and disposal of the fluid and the transformers began in September 1991. This process involved weighing the transformers prior to acceptance of the fluid and equipment at the disposal site. Using the nameplate and specification information, The Ryan Co. had considered the weight of each transformer to be 7,200 lbs. or a total of 21,600 lbs. The actual weight of the three transformers was 23,785 lbs. for a difference of 2,185 lbs. This extra weight led to an increased cost for disposal. At the end of October 1991, The Ryan Co. notified the Middlesex County Commissioners of this increased cost for which it sought a change order.

24. By then, the Middlesex County Commissioners had been notified by the disposal site operator, Aptus Environmental Services, that the transformers and fluid had been received and accepted. Aptus forwarded the hazardous waste manifest listing the increased weights of the transformers. (See, Ex. 9)

25. In December 1991, The Ryan Co. formally filed change order requests pursuant to Contract, Article VI; for \$10,946.00 for disposal of the fluid and for \$1,302.00 for disposal of the transformers due to the increased weights.

26. Mr. Sullivan opined in January and February 1992 opinions on these change order requests that Contract, Section 4.1.1.2. "prevents any additional monies to be paid"

to The Ryan Co. He determined that the change orders dealt "with The Ryan Co. and their subcontractors." (Ex. 5)

27. The change order requests were denied by the Middlesex County Capital Facilities Planning Department in February 1992. In March 1992, The Ryan Co. appealed the denials to the Middlesex County Commissioners. The Ryan Co. then appealed in April 1992 the inaction of the County Commissioners on the change order requests.

Conclusion

The issues on appeal, involve whether The Ryan Co. faced upon commencing performance of the Contract; conditions sufficiently addressed by the Contract provisions, or patent conditions, or latent conditions, when it encountered the very high PCB contamination levels and increased weights in each of the three transformers.

The record demonstrates that the only way the fact of the high levels of contamination could have been detected for purposes of bidding would have been to sample the fluid. The testimony of Mr. Grady as to the custom of the trade in such matters as well as the risks and expenses involved in undertaking that route, demonstrate The Ryan Co. acted reasonably in not sampling or in not requesting that Middlesex County sample the fluid. The fact that none of the other companies bidding on the project sought to sample the fluid or to request that the County sample the fluid, or that the County never suggested a need to sample the fluid and had

no Contract term calling for sampling pre-bid, also lends support for the reasonableness of The Ryan Co.'s failure to sample the fluid.

There is also no evidence to show the high contamination level was a patent condition discoverable by The Ryan Co. The Contract specifications at Section 11 on disposal do not address other than with a general direction, how to dispose of fluid found to be over 500 ppm. This is in contrast to how the specifications contain separate discussions for contamination levels under 50 ppm, and between 50 and 500 ppm. When this information is considered along with the descriptive information about the transformers at Contract, Section 4.1.1.1., and along with the nameplate data on the transformers, it is clear the specifications did not provide notice to bidders that they could expect to encounter very high contamination levels as occurred.

The nameplate and specification information concerning the contamination level of the fluid turned out to be erroneous. The specifications did not give notice to bidders that a high level of contamination might be found and to bid with that risk in mind. On the contrary, the description of the transformers in the specifications and the nameplate information, even though not matching, still yielded only a low level of contamination no matter which data was used in calculating according to customary practices in the trade. Middlesex County must bear responsibility for this misleading information, and cannot escape this responsibility by relying

on Contract, Section 4.1.1.2. with its general warning about the bidder's responsibility to "familiarize himself with all conditions (including actual transformer dimensions, weights and gallons of fluid) which may affect his work." (Ex. 1) This was a latent condition. As a general principle, the Court in Bowser v. Chalifour, 135 N.E.2d 643, 645 (Mass. 1956) noted the following:

It is settled that a written instrument is construed strongly against the party who drew it if ambiguous or uncertain language is used. [citations omitted]

In Glynn v. City of Gloucester, 401 N.E.2d 886, 891 (Mass.App. 1980), the Court discusses a course of events like that faced by The Ryan Co.

On a public construction contract, if actions or requirements of the public agency necessitate changes in the work as it progresses, thereby causing the contractor to perform extra work or incur added expense, or if the contractor encounters materially different conditions from those predicted by the ... specifications, ... the contractor must follow the procedures spelled out in the contract ... to adjust the price

Contract, Article VI instructs the General Contractor as to the procedures to follow to present its claim of extra expense due to a latent condition. The record shows The Ryan Co. has satisfied its Contract obligations through its written notices and discussions with Middlesex County once the increased contamination levels were detected along with the attendant increased costs of disposal.

Middlesex County does not dispute the reasonableness of the revised costs being claimed by The Ryan Co. for the disposal of the fluid and the transformers if it should be entitled to these change orders. In this regard, The Ryan Co.'s efforts to mitigate the increase in costs by seeking other bids for disposal besides its original subcontractor add support for relying on this agreement.

Based on the foregoing discussion, the change orders for the disposal of the fluid and the transformers are allowed. It is so ordered. The Ryan Co. had also filed a change order for \$2,728.00 in connection with this same Contract. The parties settled this claim for \$2,160.00, filing the Settlement Agreement on April 5, 1993, thereby mooted the appeal of the denial of that change order.

DIVISION OF ADMINISTRATIVE
LAW APPEALS

Sarah H. Luick, Esq.
Administrative Magistrate

DATED:

May 27, 1993

MASS. J8.3: 993/6-25 ✓

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Appeal of:

Cresta Construction, Inc.

Appellant:

Docket No. CP-93-046

v.

Division of Capital
Planning and Operations,
Respondent

Appearance for Appellant:

John Cresta
Andres Bachman
Cresta Construction Inc.
24 Olde Boston Square
Westford, Mass. 01886

Appearance for Respondent:

Gerald Solomon, Esq.
Division of Capital Planning
and Operations
One Ashburton Place
Boston, Mass. 02108

Administrative Magistrate:

Joan Freiman Fink, Esq.

DECISION

Pursuant to G.L. c. 30 s. 39Q, the Appellant, Cresta Construction Inc. is appealing the decision of the Division of Capital Planning and Operations (hereinafter DCPO) rejecting change order #175 submitted in connection with the work performed on the judge's bench at the Essex County Courthouse, Massachusetts Project No. J84-2. The appeal was timely filed. A hearing on the merits of the appeal was held on June 14, 1993 at the offices of the Division of Administrative Law Appeals, 100 Cambridge Street, Boston, Mass., pursuant to G.L. c. 7 s. 4H and 801 CMR 1.01, et seq.

Various documents were entered into evidence at the hearing (Exhibits 1 - 8). Both parties presented oral arguments. One cassette tape recording was made of the hearing.

The Appellant contends that under the terms of the contract, one of the multiple jobs it was required to perform was to refinish and relocate the existing judge's bench to Courtroom 3. However, during the course of the work, the Appellant received a letter from the architect indicating that the judge's bench was to be restored. After reviewing the situation, Cresta determined that the price of restoring the old bench was greater than the cost of building a new bench. Thereupon, Millwork Inc., a company owned by Cresta Construction built a new bench. After completion of the job, Cresta submitted a change order in the amount of \$19,031.51 representing the cost of completion of the new judge's bench.

The Respondent contends that the contract calls for relocation and refinishing of the bench and that no extra work was ever required or requested by Cresta. It thus asserts that it should not now be held responsible for the additional expense incurred by Cresta Construction.

FINDINGS OF FACT

Based on the evidence presented at the hearing, I make the following findings of fact:

1. In 1989, Cresta Construction Co. contracted for the completion of certain work to be performed in conjunction

with the renovation of the Essex County Superior Courthouse, Massachusetts Project No. J84-2 (Exhibit 2). This renovation was necessitated by a recent fire in the Courthouse.

2. Cresta Construction had submitted its bid price for the carpentry work which included the building of one new judge's bench and clerk's desk for Courtroom No. 4 as well as the relocation of an existing judge's bench to Courtroom No. 3.

3. Section 1.02 A. of the contract: Description of Work provides in part that the Appellant shall "provide labor, materials and equipment necessary to complete the work of this Section, including but not limited to the following:

(3). Existing judge's bench in existing gutted courtroom shall be relocated to Courtroom No. 3." (Ex. 2).

4. Section 1.02 C of the contract: Related Work provides in part that the "following items of work are not included in this Section and are specified under the designated Sections:

(4)(b). Refinishing of existing judge's benches and other existing wood casework" (Ex. 7).

5. On May 3, 1990. Cresta Construction received a letter from Perry, Dean, Rogers & Partners, the architects

of the project which contained the provision that the judge's bench was to be restored (Exhibit 7).

6. Upon receipt of that letter, Cresta Construction contacted the architect and was informed that Cresta was responsible for restoring the judge's bench.

7. After reviewing the condition of the existing bench, Cresta determined that it would be more costly to restore the existing bench than to build a new one.

8. Millwork Inc., a company owned by Cresta, thereupon built a new bench for the cost of approximately \$19,000.

9. Under the terms of Article VI (3) of the contract in circumstances in which the architect directs that the contractor perform work in excess of the contract, this work may be "performed under protest" (Exhibit 3).

10. Cresta Construction did not perform the work of building a new bench "under protest."

11. Article VI of the contract provides for the filing of change orders. Section 1 states in pertinent part:

"Whenever a change order is requested or ordered, and said change will cause an adjustment in the contractor's cost, the contractor or project manager may request an equitable adjustment in the contract price. A request for such an adjustment shall be in writing and shall be submitted by the party making such claim to the other party before commencement of the pertinent work or as soon thereafter as possible" (Ex. 3).

12. On April 13, 1992, after the completion of the new judge's bench, Cresta Construction submitted change order

#175 requesting the amount of \$19,031.51 representing the cost of construction of a new bench.

13. On November 24, 1992, the Deputy Commissioner of DCPO, Neil Johnson, rejected this change order and Cresta filed an appeal of this denial to the Commissioner of DCPO (Exhibits 4 & 5).

14. On January 12, 1993, Commissioner Kevin Smith affirmed the Deputy Commissioner's denial of the change order and on that date, Cresta Construction Company filed an appeal with the Division of Administrative Law Appeals (Exhibits 6 & 7).

CONCLUSION

Under the terms of the contract for the renovation of the Essex County Superior Courthouse, Mass. Project No. J84-2, Cresta Construction was responsible for refinishing and relocation of the existing judge's bench to Courtroom No. 3 (Exhibits 2 & 7). There was no provision in the contract for the building of a new bench to replace this existing bench.

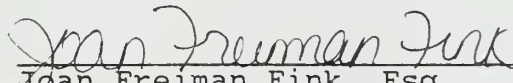
If Cresta Construction felt that there was any ambiguity concerning the work to be performed on the judge's bench, it should have sought clarification of the issue prior to submitting its bid. Moreover, once the bid had been submitted and accepted, if Cresta then felt that there was an issue concerning the refinishing of the bench, it should have submitted a change order in accordance with the provisions of Article VI of the contract. If the change

order had been refused, Cresta could then have performed the work under protest in accordance with the provisions of Article VI. However, Cresta did not perform the work under protest and failed to file a change order until after the work had been completed.

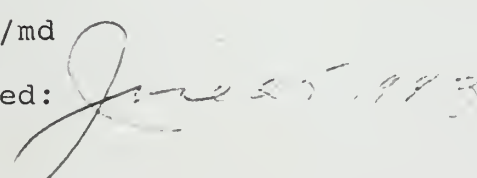
Since the relocation and refinishing of the judge's bench was required under the terms of the contract and no issue had been brought to the attention of DCPO prior to the completion of the contract, DCPO is not now required to compensate Cresta Construction Inc. for the building of a new bench.

For the foregoing reasons, the denial of change order #175 is affirmed. So ordered.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Joan Freiman Fink, Esq.
Administrative Magistrate

JFF/md

Dated: 

ACME
BOOKBINDING CO., INC.

JUN 22 2000

100, CAMBRIDGE STREET
CHARLESTOWN, MASS.

